NO 90-1614

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYMAN B. PRITCHARD, ANNA L. PRITCHARD and ENTERPRISE WASTE OIL, INC.,

PETITIONERS

v.

LOUDON COUNTY, EX REL, DOUG LAWRENCE, Building Commissioner,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF WAYMAN B. PRITCHARD, ANNA L. PRITCHARD and ENTERPRISE WASTE OIL, INC.,

PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Tennessee erred in dismissing the Petitioners' appeal and in failing to hold that the enforcement of the Loudon County Zoning Ordinance against Petitioners was unconstitutional.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 3

QUESTION PRESENTED FOR REVIEW..... 1

REFERENCES TO OFFICIAL REPORTS..... 4

JURISDICTION..... 5

CONSTITUTIONAL PROVISION INVOLVED..... 5

STATEMENT OF THE CASE..... 6

ARGUMENT..... 18

Whether the Supreme Court of Tennessee erred in dismissing the Petitioners' appeal and in failing to hold that the enforcement of the Loudon County Zoning Ordinance against Petitioners was unconstitutional.

CONCLUSION..... 37

APPENDICES

APPENDIX A: Opinion of Loudon County, Tennessee Chancery Court, April 11, 1989..... 1a

APPENDIX B: Judgment or Order of Court of Appeals of Tennessee, Eastern Section, September 12, 1990..... 16a

APPENDIX C: Judgment or Order of the Supreme Court of Tennessee, January 14, 1991..... 17a

TABLE OF AUTHORITIES

CASE

City of New Orleans v. Dan Levy, et al., 98 So.2d 210 (1957).....26

City of Shreveport v. Dickson, 160 La. 563, 107 So. 427 (1926).....27

Dalton v. Van Dien, 339 N.Y. Supp. 2d 378 (1972).....30,32

LeMasters v. City of Winnemucca, 113 F.R.D. 37 (D. Nev. 1986).....20

People v. Klein Corp., 86 Misc. 2d 354 (1976).....33

Simmons v. City of Shreveport, 221 La. 902, 60 So. 2d 867 (1952).....27

Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497, 502 (1943).....31

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 1885)..... 21,26,31

REFERENCES TO OFFICIAL REPORTS

The Opinion of Chancellor Frank V. Williams, III, Loudon County, Tennessee Chancery Court, is not reported, (included in Appendix), but was issued in Cause No. 7887, on April 11, 1989.

The Judgment or Order of the Court of Appeals of Tennessee, Eastern Section, filed on September 12, 1990, is not reported but bears Cause No. 64 and is included in the Appendix.

The Judgment or Order of the Supreme Court of Tennessee filed on January 14, 1991, is not reported but is included in the Appendix.

JURISDICTION

The Petitioners seek a review of the Judgment or Order of the Supreme Court of Tennessee filed on January 14, 1991.

A Motion for Rehearing was not filed.

This is the initial Petition for Writ of Certiorari and not a Cross-Petition for Writ of Certiorari.

The statutory provision believed by Petitioners to confer on the Supreme Court of the United States jurisdiction to review the Judgment and Opinion below by Writ of Certiorari is 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States:

1. Citizenship -- Due Process of Law -- Equal Protection. -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action brought by Loudon County, Tennessee, through its Building Commissioner seeking to enjoin the Petitioners' operation of a petroleum reprocessing facility in a rural area zoned

for residential purposes. The Petitioners contend that the Loudon County Zoning Ordinance was being enforced against them in an unconstitutional and discriminatory manner. The Petitioners throughout this case, and particularly at the trial level, have consistently raised the constitutional issue and a substantial federal question.

The action seeking injunctive and other relief was initially filed in the Loudon County, Tennessee Chancery Court on December 18, 1987. Thereafter, the Petitioners properly filed an answer on January 19, 1988.

Prior to trial, several other series of pleadings were filed by the parties but are not pertinent to the issues herein involved.

This cause came on for trial before Chancellor Frank V. Williams, III, in the Loudon County, Tennessee Chancery Court on

April 4, 5, and 7, 1989. On April 11, 1989, Chancellor Williams (hereinafter referred to as the Trial Court) issued a Memorandum Opinion holding that the Petitioners had failed to show that the enforcement of the Loudon County Zoning Ordinance against them was unconstitutional, and ordered the immediate cessation of activities by the Petitioners. On April 18, 1989, a Judgment in accordance with said Memorandum Opinion was entered.

On May 9, 1989, the Petitioners filed their Notice of Appeal in the Loudon County Chancery Court, along with the requisite Appeal Bond.

On August 28, 1989, an Order was entered in the Trial Court overruling the Motion for Stay of Injunction with reference to further business activity but granting and sustaining the Motion for Stay of

Injunction with reference to removing all structures and equipment on the subject real property.

Thereafter, counsel for Petitioners, W. P. Boone Dougherty, a member of the bar of this Court for approximately twenty-four (24) years, experienced a recurrence of his major depression problem which lasted almost a year. He is now fairly effectively recovered and is functioning with some efficiency. However, during the period from approximately September 1989, until September 1990, said counsel experienced a recurrence of his major depression which was later also diagnosed as manic-depression. During this period of time, counsel for Petitioners was able to work at times but with considerable difficulty with matters which required intellectual thought, effort and analysis.

More specifically, beginning with approximately September 1989, a series of Motions for Additional Time was filed with the Court of Appeals requesting additional time and reciting therein the problems that counsel for Petitioners was having with his major depression. All of this culminated with an Order entered on February 16, 1990, by Court of Appeals Judge Houston M. Goddard permitting the Petitioners until February 15, 1990, to file their brief. Said brief was filed on February 15, 1990.

Up until that time, because of counsel for Petitioners' health problems, he was not able to prepare and complete the Abridged Record for filing. The Abridged Record was finally completed and filed on August 1, 1990.

In the interim between February 15, 1990, and August 1, 1990, counsel for

Petitioners was hospitalized on five (5) separate occasions: In December 1989, for a heart catherization and depression; in March, April and May, 1990, for treatment of his major depression; on or about June 4, 1990, for emergency surgery of a ruptured appendix; and July 30, 1990, through August 4, 1990, for further treatment of his major depression which was diagnosed for the first time as manic-depression.

On April 4, 1990, Court of Appeals Judge E. Riley Anderson issued an order requesting that counsel for Petitioners provide medical evidence with reference to his medical situation that existed at that time. On April 11, 1990, counsel for Petitioners filed the Affidavits of two (2) psychiatrists who had been treating him. Said Affidavits were filed with the Clerk of the Court of Appeals; however, the Court

file of the Court of Appeals does not contain these Affidavits, even though counsel for Petitioners possesses copies of said Affidavits with the Court stamp thereon. Since the Court file in the Court of Appeals allegedly did not contain said Affidavits, said Affidavits were not before the Court of Appeals at the time the Appeal was dismissed on September 12, 1990. On September 12, 1990, an Order was filed in the Court of Appeals for Tennessee, Eastern Section, which stated in its entirety: "For good cause, this appeal is dismissed at Appellants' cost."

It is apparent that the primary reason the Court of Appeals dismissed said Appeal was the alleged absence of medical information concerning counsel for Petitioners which was ordered filed pursuant to the Order of April 4, 1990. Both of the

Motions and Responses filed by the parties referred to this documentation. However, counsel for Petitioners through his office (he was a patient in St. Mary's Medical Center, Knoxville, Tennessee, at the time) did file the Affidavits of the two (2) psychiatrists but for some reason these documents are not part of the Court records. As indicated, and these can be furnished to this Court, the copies of said Affidavits in counsel for Petitioners file clearly show that said Affidavits were filed with the Court of Appeals as required on April 11, 1990.

Any delay in the filing of the Brief or Abridged Record by counsel for Petitioners was clearly legitimately due to his major depression problems which he experienced during said twelve (12) month period.

Following the order of the Court of

Appeals, dated September 12, 1990, the Petitioners filed a Motion to Alter or Amend which was overruled on November 8, 1990. Thereafter, on December 10, 1990, the Petitioners filed an Application for Permission to Appeal in the Supreme Court of Tennessee. This was denied by the Order of January 14, 1991.

This case and Appeal involves the application and implementation of the Loudon County, Tennessee Zoning Resolution by the Loudon County authorities. It is the contention of the Petitioners that Loudon County has engaged in serious unconstitutional activity with reference to the manner in which it has enforced its Zoning Resolution as it relates to the Petitioners and others in Loudon County, Tennessee. The Petitioners acknowledge that their use of the real property in question

is not permitted within the residential zone established by the Loudon County Zoning Ordinance. However, the Petitioners also contend that the Loudon County Zoning Ordinance as applied to them, is being unconstitutionally applied because the Petitioners contend that it is being enforced in a selective and discriminatory fashion against the Petitioners while numerous other individuals and businesses in Loudon County, Tennessee are being permitted to engage in industrial and commercial businesses and uses in property zoned solely for residential or agricultural uses. The Petitioners submit that proof at trial showed clearly that such activities in violation of the Loudon County Zoning Ordinance are almost three hundred (300) in number, and the Loudon County Building Commissioner, Doug Lawrence, and Loudon

County, are knowingly permitting industries and businesses to continue such activity in residential and agricultural zones where such activities are not legally permitted.

Certain of the major examples presented clearly at trial are Crossroads Machine Shop and White Wing Welding. In fact, Crossroads Machine Shop is being operated in a residential zone within eyesight of the Loudon County Building Commissioner's home.

It must be noted that the activity engaged in by the Petitioners, though on residentially zoned property, was being conducted in a rural area of Loudon County.

Further, the proof presented at trial showed further that Loudon County was engaging in numerous instances of illegal spot zoning, as well as enforcement of the Zoning Ordinance only in situations where neighbors made complaints.

Further, in Loudon County itself, there is at least one other facility where petroleum or fuel tanks are permitted and a business conducted in connection therewith in a zone not zoned for such activity.

To show the extent of the participation of Loudon County in the unconstitutional enforcement of the Zoning Ordinance, we have the example presented at trial (See Abridged Record, page 286) where the Loudon County Tax Accessor acknowledged that he told Mr. Farmer of White Wing Welding, a business being clearly operated in an illegal zone, not to give anyone any receipts so they would not be able to prove that he was in business.

There are further examples where friends or relatives of Loudon County officials are being permitted to openly operate commercial and industrial businesses

on parcels of real property zoned for residential or agricultural purposes, and no enforcement whatsoever has been implemented.

ARGUMENT

WHETHER THE SUPREME COURT OF TENNESSEE ERRED IN DISMISSING THE PETITIONERS' APPEAL AND IN FAILING TO HOLD THAT THE ENFORCEMENT OF THE LOUDON COUNTY ZONING ORDINANCE AGAINST PETITIONERS WAS UNCONSTITUTIONAL.

Dealing first with the issue of the denial of the Application for Permission to Appeal by the Supreme Court of Tennessee filed on January 14, 1991, the Petitioners respectfully submit that the Supreme Court of Tennessee abused its discretion and did not fairly or even adequately review or consider the facts in this matter relating to the filing of the Brief and Abridged Record, and the action by the Court of

Appeals of September 12, 1990. First of all, the Brief was filed on February 15, 1990, within the time approved by the Order of Court of Appeals Judge Houston M. Goddard.

Thereafter, the Abridged Record was completed and filed on August 1, 1990. In this context, on April 4, 1990, Court of Appeals Judge E. Riley Anderson issued an Order requesting that counsel for Petitioners provide medical evidence with reference to his medical situation that existed at that time. On April 11, 1990, counsel for Petitioners filed the Affidavits of two (2) psychiatrists who had been treating him. These Affidavits were properly filed, but for some reason were not presented to the Court at the time the Appeal was dismissed on September 12, 1990.

In any event, any delay in the filing

of the Brief or Abridged Record by counsel for Petitioners was clearly and legitimately due to his major depression problems which he experienced in said twelve (12) month period. In the case of LeMasters v. City of Winnemucca, 113 F.R.D. 37 (D. Nev. 1986), the Court dealt with the precise issue of good cause and the illness of counsel. That case dealt with service of process, but the principles are the same as in the instant case. In discussing this issue, the Court stated as follows in 113 F.R.D. at 38:

> In analagous situations, it has been held that illness of counsel may justify a failure to comply with filing deadlines.

In this case, the Court held that counsel's illness constituted good cause.

It must also be noted that during the pertinent period of time involved, counsel for Petitioners in the instant case was a solo practioner.

Turning now to the issue of unconstitutional enforcement, the leading case which initially enunciated the legal principles relative to equal protection and discriminatory and selective enforcement of municipal ordinances is the case of Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1885), where Justice Matthews, speaking for the Supreme Court of the United States, held as follows at 356-374:

> In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. ...
>
> That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in

conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be excerised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.

. . .

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and

the equal protection of the laws is a pledge of the protection of equal laws. ...

It is contended on the part of the petitioners, that the ordinances for violations of which they are soverally [sic] sentenced to imprisonment are void on their face, as being within the prohibition of the Fourteenth Amendment, and, in the alternative, if not so, that they are void by reason of their administration operating unequally, so as to punish in the present petitioners which is permitted to others as lawful, without any distinction of circumstances; an unjust and illegal discrimination, it is claimed, which, though not made expressly, by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. ... And the law is the definition and limitation of power. ... But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are

secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

... For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the

petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no race and nationality to which the petitioners belong, and which in the eye of the law is not

> justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged.
>
> To this end, the judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

The foregoing principle has been applied with general uniformity to the enforcement of zoning ordinances. In City of New Orleans v. Dan Levy, et al., 98 So.2d 210 (1957), the court held as follows at 211-214:

> In this injunction proceeding the City of New Orleans seeks to compel the removal of a permanent plastic covering or roof now existing over the court yard that

separates two buildings ...

...

Accepting our decision that the Vieux Carre ordinances are constitutional, and apparently conceding that the controversial plastic roof does not conform with the requirements of the invoked municipal laws, the defendants in the instant injunction suit contend only that '... the actions of the City and the Commission in administering the laws in question were unreasonable, capricious, arbitrary and discriminatory; and, therefore, in violation of the Equal Protection clause of the United States Constitution.'

And in support of such contention defendants rely on City of Shreveport v. Dickson, 160 La. 563, 107 So. 427 and Simmons v. City of Shreveport, 221 La. 902, 60 So. 2d 867 wherein this court approved the principle set out by the United States Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 1073, 30 L.Ed. 220, that: '... Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the

prohibition of the constitution...'

The city does not dispute the correctness of this doctrine. It maintains only that defendants have not shown unjust discrimination against them in the administering of the municipal laws in question.

With respect to the Vieux Carre ordinances the record conclusively discloses that in recent years there have been innumerable non-conforming alterations of buildings throughout the French Quarter against which the city has sought no injunctive relief; some, in fact, were authorized by officially granted permits. The existence of this widespread condition was freely admitted during the trial by two former members of the Vieux Carre Commission who are architects by profession.

Among such violations noted are specifically the following: Maison Blanche Company was permitted by councilmanic action to demolish buildings located on Bienville Street (of quaint and distinctive character of the Vieux Carre architecture) and to erect in their place a modern, multi-storied brick structure. At 227 Dauphine Street there exists an

ultramodern dental building--one that undeniably is not in keeping with the antique architecture of that area. The operator of the LaLune Cocktail Lounge at 800 Bourbon Street was granted permission to entirely and permanently enclose a court yard similar to the one involved here, the enclosure (including the roof) having been made with glass and steel and being plainly visible from the street. In the court yard of the Napoleon House, located at St. Louis and Chartres Streets, certain non conforming alterations were made and still exist. True, in a criminal prosecution the operator of that establishment was convicted and fined (see City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559). But no injunction suit has ever been brought to compel conformity. As to this omission counsel for Plaintiff merely says: 'The city is now criticized for not having ridden herd on the man ....'

Additionally, it is shown (and conceded by the city) that there are countless violations of the sign provisions of the Vieux Carre ordinances and that for approximately three years no effort has been made to enforce the regulations....

Too, we note that modern

> metal awnings attached to the exterior of buildings, and which overhang sidewalks, are permitted throughout the French Quarter. An assistant city attorney testified that in his opinion awnings are not regulated by the ordinances inasmuch as no specific mention is therein made of them. Assuming this to be true it cannot be denied that modern metal awnings are out of harmony with Vieux Carre architecture.
>
> ...
>
> In view of the aforementioned facts and circumstances we are forced to conclude that the present action constitutes an unfair, unjust and illegal discrimination as to these defendants and that the injunctive relief sought against them should not be granted until and unless the regulatory measures under consideration are enforced in like manner as to all other persons similarly situated.
>
> For the reasons assigned the judgment appealed from is reversed and set aside and plaintiff's suit is dismissed.

A more recent case which further discusses and analyzes these issues is Dalton v. Van Dien, 339 N.Y. Supp. 2d 378 (1972). In

discussing the issue of selective and discriminatory enforcement, the Supreme Court of New York held as follows at 382-384:

> The plaintiff's final argument is that the prohibition against trailers is unenforceable against him because of the discriminatory manner in which it has been enforced. In effect, this is an unequal protection argument based upon Yick Wo. v. Hopkins, 118 U.S. 356, 6 S.Ct. 11064, 30 L.Ed.d 220. In Yick Wo it is recognized that a regulatory ordinance, valid on its face, could be unconstitutional as applied because of the discriminatory fashion in which it is enforced. Borrowing from Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497, 502, the Court of Appeals has stated the test to be as follows:
>
> 'The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear

> on the face of the action taken with respect to a particular class or person ...or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself... But a discriminatory purpose is not presumed ... there must be a showing of 'clear and intentional discrimination.'' (Citation omitted.)

The Dalton case presents an additional issue. Since the Petitioners have pointed out to the Loudon County authorities through discovery and otherwise the many violations which exist in an open and notorious fashion in Loudon County, Tennessee, the Loudon County Building Commissioner, Loudon County Planning Commission, and Loudon County Board of Zoning Appeals, as well as the Loudon County Commission, have sought to rezone certain of the properties involved. However, what has occurred has in actuality compounded the illegal action of the Loudon

County representatives in that in most of the instances in question, the Loudon County authorities have engaged in illegal spot zoning, a further intensification of the entire illegal position pursued by Loudon County, Tennessee.

An additional aspect must be presented to the Court. There is clear evidence that the Building Commissioner advised the Petitioner Wayman Pritchard at the outset of this matter that he only enforced the zoning ordinance in situations where neighbors made complaints. This is clearly in violation of the law, and a further example of selective and unconstitutional enforcement. In this context, we refer the Court to People v. Klein Corp., 86 Misc.2d 354 (1976), where the court in New York State held as follows, relative to this precise issue, at 357-359:

The defendant alleges that the City of Yonkers has selectively enforced its zoning ordinance in regard to this defendant. At trial the building inspector for the city admitted that there was no policy of enforcing the zoning laws except in response to complaints.

...

Although this defendant has not met the burden of proving discriminate enforcement in this case, the People, through its building inspector witness, have admitted that enforcement of the zoning law in the City of Yonkers depends entirely upon the institution of citizen complaints.

...

The protection of the law should apply equally to actively enforced laws and seldom enforced laws. ...

> The law does not require that every single ordinance or statute be enforced to the same degree but only that, if an ordinance or statute, is enforced it be enforced equally and without discrimination as to all persons and all classes. ...

In the case of zoning violations however, where, as in this case, the alleged violation is open and notorious, it is the obligation of

> the legally instituted enforcing body to establish some adequate method to ensure that the guarantee of equal protection under the law afforded all citizens under the Federal and State Constitutions (US Const, 14th Amdt; NY Const, Art I, Sec. 11) is met.
>
> The court finds that this defendant has not been afforded the protection required by the Federal and State Constitutions.

The proof in the instant case is abundant to show clearly that in the case before the Court, Loudon County has engaged in a conscious and intentional pattern of discrimination which has been deliberate toward the Petitioners. One example will demonstrate this to the Court. A person operating a commercial business in Loudon County was told by Doug Lawrence, the Building Commissioner, not to sell certain items to the Petitioners so they would not know the person was involved actively in a commercial business on residentially zoned

property. In a further example, a close relative of a member of the Loudon County Planning Commission is being permitted to openly operate a body shop in a zone not permitting such activity. Further, there are many other examples in Loudon County of the open and notorious operation of commercial and industrial enterprises on parcels of real property zoned for residential or agricultural purposes. There is a further example where a friend of the Loudon County Building Commissioner is being permitted to operate a business establishment, and no enforcement activity of any sort whatsoever has even been contemplated. In addition, the Loudon County authorities, as referred to above, have made half-hearted efforts to seek enforcement against certain business or industrial activities, but to date no legal

action has been filed against anyone in Loudon County except the Petitioners. In fact, a lawsuit concerning alleged zoning violations has not been instituted in Loudon County in the last ten (10) years. There are further examples where the Loudon County Building Commissioner and others with Loudon County have attempted to help people in violation get their property rezoned, but in so doing very prominent examples of illegal spot zoning have occurred.

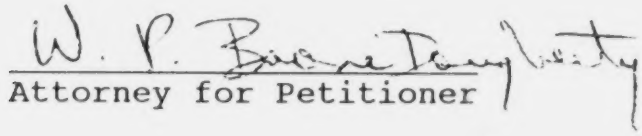
CONCLUSION

In conclusion, the Petitioners respectfully contend that the Supreme Court of Tennessee and the Court of Appeals erred in dismissing the Petitioners' Appeal and in not holding that the Loudon County Zoning Resolution was being enforced and applied as to Petitioners in an unconstitutional manner. The Petitioners pray that this

Court grant the Writ of Certiorari so that this matter may be examined in detail.

This 12th day of April, 1991.

Respectfully submitted,



Attorney for Petitioner

OF COUNSEL:

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603 W. Main Avenue
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(615) 637-2022

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for Writ of Certiorari has been properly mailed, postage prepaid, to Harvey L. Sproul, Attorney at Law, 205 East Broadway, Lenoir City, Tennessee 37771, on this the 12th day of April, 1991.

W. P. Boone Dougherty

AFFIDAVIT OF TIMELY FILING

STATE OF TENNESSEE

COUNTY OF KNOX

W. P. BOONE DOUGHERTY, being duly sworn, deposes and says:

1. That he is an attorney licensed to practice law in the State of Tennessee, and is also a member of the bar of the Supreme Court of the United States, having been so

admitted in 1966.

2. That on the date of March 20, 1991, within the time specified for filing, he deposited the requisite number of copies as required by Supreme Court rules in the United States mail, with sufficient postage, addressed to the proper address of the clerk of the United States Supreme Court.

This 12th day of April, 1991.

W. P. Boone Dougherty

W. P. BOONE DOUGHERTY

Sworn to and subscribed before me this 12th day of April, 1991.

My Commission Expires:

December 26, 1994

NOTARY PUBLIC

IN THE CHANCERY COURT FOR
LOUDON COUNTY, TENNESSEE

LOUDON COUNTY, ex rel
DOUG LAWRENCE, BUILDING COMMISSIONER

VERSUS NO. 7887

WAYMON B. PRITCHARD,
ENTERPRISE WASTE OIL
COMPANY, INC., et al

O P I N I O N

This suit is brought by Loudon County, Tennessee to enjoin the defendants' operation of a petroleum reprocessing facility in an area zoned for residential purposes. Section 5.010 of the Zoning Resolution of Loudon County, Tennessee (Exhibits 4, 5, and 6) creates a Suburban Residential District, and incorporates within the district the land owned and occupied by the defendants. A petroleum reprocessing plant is not one of the uses permitted by the ordinance in that district.

In 1984, the defendant, Enterprise Waste Oil Company, Inc., began to locate

various tanks and other equipment on this land, which was then owned by the parents of the defendant, Waymon B. Pritchard, who is the president and chief stockholder of the defendant corporation. In February 1988, the parents conveyed the tract to their son, Waymon Pritchard and his wife, Anna Pritchard, who, in turn leased the property to the corporation (Exhibits 1 and 2).

During 1985, the defendants added additional equipment, including a thirty-foot silo-type cooker, and in the early part of 1986 began "cooking" used crankcase oil, hydraulic fluid, and other types of used petroleum products which the defendants hauled into the facility by tanker trucks from points throughout East Tennessee. Waymon Pritchard described the process as being essentially the distillation of used petroleum for the purpose of driving off

water, which comes off as steam. The reprocessed petroleum is then sold to businesses which use it in the manufacture of asphalt and related products.

After the defendants began "cooking" the used petroleum, neighbors complained to the Loudon County Building Commissioner, Doug Lawrence, who, on February 10, 1987, wrote a letter to the defendants advising them that they were in violation of the ordinance and asking them to appear before the Board of Zoning Appeals (Exhibit 7). The Loudon County Board of Zoning Appeals refused to grant the defendants a variance from the ordinance but did permit the defendants to continue operating for a period of nine months while the defendants attempted to persuade the Loudon County Commission to rezone the property (Exhibit 10). The Loudon County

Commission refused to rezone the defendants' property and, after the expiration of nine months, the County brought this lawsuit (Exhibit 8 and 12).

The defendants admit that their use of the property is not permitted within the residential zone and that they are in violation of the ordinance. But they contend that the ordinance, as applied to them, is unconstitutional because, they argue, it is being enforced in a selective and discriminatory fashion against the defendants while other violations of the ordinance are being permitted, if not condoned, by County officials. The defendants filed a counter-complaint alleging that County officials had violated their civil rights pursuant to the Fourteenth Amendment to the United States Constitution.

Two other issues were raised by the plaintiff but will not be discussed because the zoning issue is dispositive of the case.

The Loudon County Zoning Resolution, as applied to the defendants is presumed to be constitutional and the defendants have the burden of proving otherwise. City of Chillicothe vs. Stouker, 374 N.E. 2d 259, 261 (Ill. App. 1978)

It is no defense to the enforcement of this ordinance that Loudon County may be enforcing it against the defendants and not others. Bowden vs. City of Covington, (W.S. Tenn. App. 1983) Furthermore, the sound exercise of prosecutorial discretion resulting in some selectivity in enforcement does not itself establish a violation of the constitution. State vs. Vadnais, 202 N.W. 2d 657, 659

(Min. 1972)

However, the defendants may prevail if they can show either:

1. That there is some specific and intentional bias or discrimination toward them, Yick Wo vs. Hopkins, 118 U.S. 356, 30 L.Ed 220, 6 S.Ct. 1064 (1885), or

2. That the enforcement of the ordinance is based upon some selective or arbitrary classification whereby others, similarly situated, have been permitted to operate in violation of the ordinance while the defendants have not been permitted to do so. Dalton vs. VanDien, 339 N.Y. Supp. 2d 378 (1972); City of Burlington vs. Kutzer, 597 P.2d 1387 (1979); State vs. Vadnais, 202 N.W. 2d 657 (Sup. Ct. Min. 1972)

For the reasons which follow, the Court holds that the defendants have failed to show that the enforcement of this

ordinance against them is unconstitutional, and accordingly orders the immediate cessation of activities by the defendants and removal of all unpermitted structures and equipment. The counter-complaint is dismissed.

The defendants have failed to show that the Building Commissioner, Doug Lawrence, or any member of the Board of Zoning Appeals or County Commission intended in any way to discriminate against the defendants in the enforcement of the ordinance. The action taken by the plaintiff was not motivated by prejudice against the defendants, nor with the intent to discriminate in favor of others similarly situated. Enforcement was initiated by the Building Commissioner in an impartial and objective manner. The fact that he responded to complaints from residents, who

obviously harbored ill will toward the defendants, does not change the fact that he was simply doing his job. There was no intentional or purposeful discrimination against the defendants by any member of Loudon County government.

Furthermore, defense counsel stated during the trial that it was their position, and that they would show, that the County's refusal to rezone the defendants' property was motivated by a desire on the part of certain officials to force the defendants to buy land in the Matlock Bend Industrial Park as part of a conspirary to financially benefit those officials who had an interest in the park. There is no proof whatsoever that this accusation has any truth to it. None of the steps taken against the defendants ever depended upon the vote of any official who may have had an

interest in the private corporations which controlled the various industrial parks. The defendants have utterly failed to prove the existence of any sort of conspiracy against them.

Granted, the manner in which the defendants are using their property has angered their neighbors. And the course which the lawsuit has taken - that is to say the defendants' accusations of discrimination and conspiracy on the part of County officials - may have angered some officials also. But this is not proof of an intent to discriminate against the defendants in the enforcement of the ordinance.

Neither have the defendants shown that enforcement of the ordinance is based upon a selective or arbitrary classification which allows others, similarly situated, to

violate the ordinance.

The defendants identify approximately thirty parcels where they allege violations of the ordinance are being permitted, and, in a cursory fashion, point out about many other possible violations. From an examination of the addresses shown on business licenses issued by the County, the defendants count 239 parcels where businesses are being operated in residential zones. (Excluding parcels within the cities of Loudon and Lenoir City.) There are approximately 13,000 parcels, in all zones, within Loudon County (excluding those in Lenoir City and Loudon).

The uses which the defendants complain about include a machine shop, woodworking, the manufacture of plastic fishing worms, a battery dealer, frame shop, welding shop, greenhouse, horse stables,

beauty shop, storage of firewood and mulch, an auto garage, trucker, kennel, and others.

The Building Commissioner explains that many of the apparent violations of the ordinance are "nonconforming uses" which predate the zoning ordinance and are therefore exempt pursuant to Section 6.020 of the ordinance.

Several were thought to involve activities which could be classified as "customary home occupations" as permitted by Section 4.040 of the ordinance.

At least two of the alleged violations were thought by County officials to be protected by a state statute which permits agricultural activities anywhere, zoning ordinances notwithstanding.

Others, have been permitted as "special exceptions" by vote of the Board of Zoning Appeals pursuant to Section 7.060 of

the ordinance. The State Planner, Patrick Phillips, explains that it is impossible for the ordinance to list all possible uses of property, and that the foregoing section is intended to provide flexibility for other uses within the spirit of the zone in which the land is located.

There is no similarity between the commercial activities which the Board of Zoning Appeals has approved as "special exceptions" and the defendants' petroleum reprocessing facility. There have been no other "similarly situated" uses of property approved by the Board of Zoning Appeals as "special exceptions". It is reasonable to expect that the Board of Zoning Appeals could tolerate a kennel, tack shop, or chapel, etc., and then decide to deny approval to the defendants for a petroleum reprocessing facility, which is essentially

an industrial activity.

Finally, the defendants argue that the County Commission has been spot zoning for others in order to cure violations of the ordinance, while refusing to grant that some relief to the defendants. Spot zoning, in conflict with the surrounding zone, for the benefit of individual property owners is generally not permissible. However, rezoning isolated tracts of property does not constitute spot zoning if carried out in accordance with the land use plan. The Court cannot determine whether or not the Commission has engaged in spot zoning to benefit other citizens because the Loudon County Land Use Plan is not in evidence. We do know, however, that the Planning Commission recommended against rezoning the defendants' property because their use was in conflict with the land use plan and

adjacent land uses (Exhibit II).

There have undoubtedly been mistakes made by the County in the enforcement of this ordinance. Explanations given by the County for the continuation of some of these other uses are clearly erroneous, for this reason, the Court cannot agree with every decision made by the Building Commission, the Board of Zoning Appeals, or County Commission. However, the evidence fails to show any sort of selective or arbitrary enforcement of the ordinance against the defendants, but, at most, shows an occasional mistake in finding facts or exercising judgment. The County is not estopped to move against this or other violations when they come to light and the facts are known.

The defendants shall immediately cease operations. No additional petroleum

products shall be brought onto the property and all such materials presently stored there shall be immediately removed. The defendants are enjoined from the further reprocessing of petroleum on this property. The defendants are mandatorily enjoined to remove all offending structures and equipment by the time the order becomes final. The counter-complaint is dismissed. Costs are taxed to the defendants.

Plaintiff's counsel shall prepare a judgment and submit to defense counsel for approval as to form and content within seven days.

This 11th day of April, 1989.

FRANK V. WILLIAMS, III
CHANCELLOR

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

WAYMAN B. PRITCHARD,
ANNA L. PRITCHARD and
ENTERPRISE WASTE OIL, INC.,

Plaintiffs-Appellants,

VS. C/A NO. 64.

LOUDON CHANCERY

LOUDON COUNTY, ex rel.
DOUG LAWRENCE, Building
Commissioner,

Defendants-Appellees.

O R D E R

For good cause, this appeal is dismissed at appellants' cost.

This 12th day of September, 1990.

Herschel P. Franks

Clifford E. Sanders

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

WAYMAN B. PRITCHARD,
ANNA L. PRITCHARD, and
ENTERPRISE WASTE OIL, INC.,

Petitioners-Appellants

V. LOUDON CHANCERY

LOUDON COUNTY, EX REL
DOUG LAWRENCE, Building
Commissioner,

Respondents-Appellees.

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

90-1614

No. _____

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYMAN B. PRITCHARD, ANNA L. PRITCHARD,
and ENTERPRISE WASTE OIL, INC.,

PETITIONERS

v.

LOUDON COUNTY, EX REL,
DOUG LAWRENCE, BUILDING COMMISSIONER,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF LOUDON COUNTY, EX REL, DOUG LAWRENCE, BUILDING COMMISSIONER,

RESPONDENTS

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TABLE OF CONTENTS

Page

Statement of the Case. 1

Summary of Argument. 7

Argument

1. There Is an Independent and Adequate State Ground for the Decision of the Tennessee Courts. .8

2. There Is No Judgment of the Highest Court of the State of Tennessee. 14

3. The Equal Protection Claim Was Fully Considered and Correctly Decided by the Trial Court. . . . 16

Conclusion. 22

TABLE OF AUTHORITIES

Cases

Michigan v. Tyler, 436 U.S. 499 (1978). 9, 14

Newman v. Gates, 204 U.S. 89 (1907) . . . 15

Christian Gospel Church v. San Francisco, 896 F.2d 1221, (9th Cir. 1990) 21

Scudder v. Town of Greendale, 704 F.2d 999, 1002 (7th Cir, 1983) 17

G.F. Plunk Construction Co. v. Barrett Properties, Inc., 640 S.W.2d 215 (Tenn. 1982) 13

Brumlow v. Brumlow, 729 S.W.2d 103 (Tenn Ct. App. 1986) 13

John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W.2d 422, 424 (Tenn. Ct. App. 1983) 13

Wilson v. Morris, 369 S.W.2d 402, 407 (Mo. 1963) 12

Statutes

Rule 2 of the Tennessee Rules of Appellate Procedure 11

Rule 11 of the Tennessee Rules of Appellate Procedure 10

Rule 14 of the Tennessee Rules of Appellate Procedure 5

Rule 27 of the Tennessee Rules of Appellate Procedure 4

Rule 39 of the Tennessee Rules of Appellate Procedure. 11

Treatises

12 Moore's Federal Practice 8

16 Wright & Miller, Federal Practice and Procedure 14

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYMAN B. PRITCHARD, ANNA L. PRITCHARD,
and ENTERPRISE WASTE OIL, INC.,

PETITIONERS

v.

LOUDON COUNTY, EX REL,
DOUG LAWRENCE, BUILDING COMMISSIONER,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF RESPONDENTS

STATEMENT OF THE CASE

This action was originally brought by Respondents in the Chancery Court of Loudon County, Tennessee seeking to enjoin the Petitioners' operation of a petroleum reprocessing facility in a rural area zoned

for residential purposes. The Petitioners defended on the basis that the zoning ordinance was being enforced against them in an unconstitutional manner. Specifically, as stated at page 15 of the Petition for Writ of Certiorari, Petitioners assert an equal protection claim in that "the Loudon County Zoning Ordinance as applied to them, is being unconstitutionally applied because the Petitioners contend that it is being enforced in a selective and discriminatory fashion against the Petitioners while numerous other individuals and businesses in Loudon County, Tennessee are being permitted to engage in industrial and commercial businesses and uses in property zoned solely for residential or agricultural uses."

Following a three day trial, the Chancellor issued a Memorandum Opinion dated April 11, 1989 finding: (1) that the Petitioners failed to show that the

Respondents intended in any way to discriminate against them in the enforcement of the ordinance and (2) that the ordinance had not been enforced in an arbitrary or selective manner as to Petitioners and others similarly situated in that there was "no similarity between the commercial activities which the Board of Zoning Appeals has approved as 'special exceptions' and the defendants' petroleum reprocessing facility."

Petitioners thereafter timely instituted an appeal in the Court of Appeals of Tennessee. On August 28, 1989 the court ordered the Petitioners to file an abridged record pursuant to Rule 14 of the Tennessee Rules of Appellate Procedure. Beginning in October of 1989, counsel for Petitioners, on the basis of his health, sought and received eight (8) extensions of time to file a brief and abridged record as required by the Tennessee Rules of Appellate Procedure and the

order of the court. On January 26, 1990, Respondents filed a Motion to Dismiss for Failure to Prosecute. On February 15, 1990, Petitioners filed their brief which did not comply with the requirements of Rule 27 of the Tennessee Rules of Appellate Procedure that such brief contain appropriate references to the record. Further, no abridged record was filed. On February 20, 1990, Respondents filed a Motion to Dismiss for Failure to Comply With the Orders of the Court based on the above.

On April 4, 1990 the Court of Appeals entered an order, in response to yet another motion for additional time on the part of Petitioners, requiring that counsel for Petitioners file affidavits and exhibits on or before April 12, 1990 demonstrating medical proof of counsel's condition since October of 1989, together with a medical prognosis as to when counsel could be expected to perform the

usual and customary duties of his occupation.

On August 22, 1990, Respondents filed a Continuing Motion to Dismiss for Failure to Prosecute and Comply With the Orders of the Court. Respondents asserted that the April 4, 1990 order of the court had not been complied with, that a document entitled "Abridged Record" filed by the Petitioners on August 1, 1990 did not comply with the requirements of Rule 14 of the Tennessee Rules of Appellate Procedure, and that the brief of the Petitioners had not been corrected to bring it into compliance with the requirements of the Rules.

On September 12, 1990, the Court of Appeals dismissed the appeal for good cause. On October 12, 1990, counsel for Petitioners filed a Motion to Alter or Amend Order of September 12, 1990 before the Court of Appeals asserting that he had filed the disputed affidavits, that he should be allowed to

supplement the brief so that it would be properly filed and that the abridged record filed was appropriate, but if not, he should be allowed to correct it. On November 8, 1990, the court denied Petitioner's motion.

On December 10, 1990, Petitioners filed an Application for Permission to Appeal on Behalf of Appellants Wayman B. Pritchard, Anna L. Pritchard and Enterprise Waste Oil, Inc. in the Supreme Court of Tennessee. Counsel for Petitioners again asserted that the disputed affidavits had been filed and attached copies of certain documents to his Application. However, such documents had no certificate of service as required by the Tennessee Rules of Appellate Procedure and had apparently never been officially filed by the Clerk for that reason and were not a part of the official court file. In an Answer to Application for Permission to Appeal to Supreme Court, the Respondents asserted the Application was not

timely filed and was not well taken in any event. On January 14, 1991, the Supreme Court of Tennessee denied the Application on consideration of the Application and the entire record in the cause.

SUMMARY OF ARGUMENT

The Petition should be denied in this matter for the following reasons. The failure of the Petitioners to prosecute their appeal and comply with the orders of the Court of Appeals, and to timely file an Application to Appeal to the Supreme Court of Tennessee constitute an independent state ground for the decision in the Tennessee courts and precludes the Supreme Court's consideration of any possible federal question of the Petitioners. Further, due to the above actions of the Petitioners, there has been no decision of Tennessee's highest court on the federal question and the Supreme Court is again precluded from considering the federal

question on that basis. In any event, the equal protection claim of the Petitioners was fully considered and correctly decided before the trial court.

ARGUMENT

There Is an Independent and Adequate State Ground for the Decision of the Tennessee Courts

There is no jurisdiction to review a state court judgment resting on adequate non-federal grounds. This is known as the independent state ground doctrine and the state ground can be either substantive or procedural. 12 Moore's Federal Practice Paragraph 511.01 provides a discussion on this doctrine. As set out by the cases therein, the procedural rule has to serve a legitimate state interest and has to have been consistently applied by the state. In any event, the rule is that: "Failure to present a federal question in conformance with state

procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Michigan v. Tyler, 436 U.S. 499, 512, n. 7 (1978).

It is clear that in this case there has been a failure to present the federal question in conformance with Tennessee procedure. Unquestionably, the health problems of counsel for Petitioners are regrettable. However, it is clear that during the time frame in question in connection with this matter, counsel for Petitioners had been working on some basis and had ample time and opportunity to withdraw from this matter and allow someone able to perform to prosecute the appeal in a timely manner. The Petitioners failed to timely file their brief as required by the Tennessee Rules of Appellate Procedure and as ordered by the court in that it was submitted

without the appropriate page references. Likewise, the Petitioners failed to file an appropriate abridged record as required by the Rules and as ordered by the court. Finally, the Petitioners failed to properly file the affidavits concerning medical treatment as ordered by the court.

Further, the Petitioners' failure to timely file an Application to Appeal to the Supreme Court of Tennessee also constitutes an independent state ground for the decision in the Tennessee courts and precludes the Supreme Court's consideration of any possible federal question of the Petitioners. On September 12, 1990, the Court of Appeals dismissed the Petitioners' appeal. On October 12, 1990, Petitioners filed a Motion to Alter or Amend Order of September 12, 1990 and did not file an Application for Permission to Appeal until December 10, 1990. Rule 11 of the Tennessee Rules of Appellate Procedure provides the

procedures for filing an application for permission to appeal. Rule 11(b) provides that the application shall be filed within 30 days after the entry of the judgment or denial of a petition for rehearing. It is undisputed the Petitioners did not file an application for permission to appeal within the above time period. Further, Rule 39(b) requires that petitions for rehearing be filed within 10 days after entry of the judgment. Again, Petitioners did not file a petition for rehearing within this time period. Rather, Petitioners filed the unusual Motion to Alter or Amend 30 days after the judgment. This motion did not constitute an application for permission to appeal under the Tennessee Rules of Appellate. Further, even if the motion could be considered to be a petition for rehearing, it was untimely in that regard.

Rule 2 of the Tennessee Rules of Appellate Procedure allows for suspension of

the rules for good cause except as to extensions of time to file notices of appeal, applications for permission to appeal and petitions for review. Although counsel for petitioners submitted that his health problems constituted good cause for relief from the rules, it appears the Court of Appeals and the Supreme Court of Tennessee found otherwise. In Wilson v. Morris, 369 S.W.2d 402, 407 (Mo. 1963), the Supreme Court of Missouri held that, as used in a statute, "good cause" "depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which the decision is committed." Clearly, it was within the discretion of the Court of Appeals and the Supreme Court of Tennessee to determine that there was not good cause shown to suspend the operation of the rules under the facts of this case.

In any event, Petitioners' Application for Permission to Appeal was untimely filed and this requirement cannot be suspended under Rule 2. In John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W.2d 422, 424 (Tenn. Ct. App. 1983), the court held that under Rule 2 appellate courts are expressly prohibited from extending the time allowed for taking appeals, that the time limits of the Rules in that regard were mandatory and jurisdictional, and that the "rules for perfecting an appeal must be strictly complied with and are not subject to waiver." See also G.F. Plunk Construction Co. v. Barrett Properties, Inc., 640 S.W.2d 215 (Tenn. 1982); Brumlow v. Brumlow, 729 S.W.2d 103 (Tenn Ct. App. 1986).

The state of Tennessee has a legitimate interest in enforcing the above procedural rules. Clearly, as determined by the Court of Appeals and Supreme Court of Tennessee, these failures to present the federal question in

conformance with state procedure constitutes an adequate and independent ground of decision which bars review in this Court. Michigan v. Tyler.

There Is No Judgment of the Highest Court of the State of Tennessee

The other jurisdictional rule that comes into play in this situation is the rule that the Court's jurisdiction to review state court judgments is limited to judgments of the highest court of the state in which decision could be had. 16 Wright & Miller, Federal Practice and Procedure Section 4007 states:

> In addition to seeking review by the proper method, a litigant must comply with the requirements of state appellant procedure. If the state's highest court denies review for failure to comply with reasonable procedural rules, "the case stands as though no appeal has been prosecuted from the judgment rendered by the trial court." In this setting, the requirement that state opportunities for appellate relief be exhausted becomes mingled with the independent state ground

> doctrine. Noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal questions, as not properly presented to the highest state court.

In Newman v. Gates, 204 U.S. 89 (1907), an appeal had been dismissed by the Supreme Court of Indiana on the basis that a necessary party had not been brought into the appeal. The Supreme Court of the United States held:

> Had the appeal been properly taken it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had,

> and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Id. at 95.

Therefore, due to the above actions of the Petitioners, there has been no decision of Tennessee's highest court on the federal question and the Supreme Court is again precluded from considering the federal question on that basis.

The Equal Protection Claim Was Fully Considered and Correctly Decided by the Trial Court

Following a three day trial, the Chancellor issued a Memorandum Opinion dated April 11, 1989 finding: (1) that the Petitioners failed to show that the Respondents intended in any way to discriminate against them in the enforcement of the ordinance and (2) that the ordinance had not been enforced in an arbitrary or

selective manner as to Petitioners and others similarly situated in that there was "no similarity between the commercial activities which the Board of Zoning Appeals has approved as 'special exceptions' and the defendants' petroleum reprocessing facility."

These findings of the Chancellor are fully supported by the evidence and are in accordance with the law as developed by the courts in this area. "It is well settled that enforcement of an otherwise valid zoning ordinance violates the Constitution only if: (1) the decision of the particular zoning body is arbitrary, or (2) if the ordinance is applied or enforced with a discriminatory intent or purpose." Scudder v. Town of Greendale, 704 F.2d 999, 1002 (7th Cir, 1983) (citations omitted). In Scudder, the plaintiff had sought permits to build a residence on real property he had acquired which did not front on a street. The permit

was denied based on an ordinance providing that all buildings be erected on a lot which fronts on a street. The court held that a particular decision or action is arbitrary if reached "without adequate determining principle or was unreasonable." Id. (quoting United Sates v. Carmack, 329 U.S. 230, 243 (1946)). The court held the decision there was not arbitrary since a valid ordinance prohibited building on lots with no frontage and the plaintiff's lot had no frontage. Applying this analysis to the present case, it is clear the decision of Respondents was not arbitrary. Unquestionably, the property in question was zoned residential and was being used by Petitioners for a petroleum reprocessing facility. Accordingly, the determination by Respondents that such use was in violation of the zoning ordinance was not arbitrary.

As set out in Scudder, a zoning

determination can also be violative of equal protection if applied or enforced with a discriminatory intent or motive. The Scudder court discussed this requirement as follows:

> Similarly, the record is silent of any evidence to support the plaintiff's theory that the ordinance was applied in a discriminatory manner. As this court in Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206 (8th Cir. 1980) stated:
>
> > "a claim under section 1983 for discriminatory enforcement of zoning regulations must involve an element of 'intentional or purposeful discrimination.' Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497; Tollet v. Laman, 497 F.2d 1231 (8th Cir. 1974). There must be allegations of 'unfair and discriminatory conduct purposefully directed toward plaintiffs.'"
>
> In Snowden v. Hughes, 321 U.S. 1, 1, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944), the Supreme Court set forth how "intentional or purposeful discrimination" in the enforcement

of a valid law or ordinance may be shown:

> "[Intentional or purposeful discrimination] may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. But a discriminatory purpose is not presumed, there must be a showing of 'clear and intentional discrimination.'"

The record in this case is completely devoid of any evidence upon which to base even an inference of "clear and intentional discrimination" on the part of the Board of Trustees. The plaintiff puts great emphasis on the fact that Weaver, the adjoining landowner, submitted a letter to the Board asking that they deny Scudder a permit to build on the lot in question. Certainly, the federal Constitution does not prohibit a citizen in a democratic society from voicing an opinion to a duly elected official; regarding the denial or issuance of a building permit.

Id. at 1002-03.

In Christian Gospel Church v. San Francisco, 896 F.2d 1221, (9th Cir. 1990), a church was denied a conditional use permit to construct a church in a residential area and brought an equal protection claim. The court held that any equal protection claim requires "a showing that a class that is similarly situated has been treated disparately." Id. at 1225.

In Scudder, the court found no discriminatory purpose on the part of the Board. In the present case, the trial court correctly found no evidence of purposeful discrimination and, in any event, it is undisputed that Petitioners presented no evidence of selective treatment being given to another similarly situated to the Petitioners, i.e. engaging in industrial activity. It is a rare instance when a zoning decision implicates the federal Constitution. As

stated by the court in Scudder, it is not the function of the federal courts to serve as zoning appeal boards since to do would further congest an already overburdened court system. 704 F.2d at 1003.

CONCLUSION

The Petition for Certiorari should be denied. The Petitioners failed to prosecute their appeal and to comply with the orders of the Court of Appeals, and to timely file an Application to Appeal to the Supreme Court of Tennessee. This failure constitutes an independent state ground for the decision in the Tennessee courts and precludes the Supreme Court's consideration of any possible federal question of the Petitioners. Further, due to the above actions of the Petitioners, there has been no decision of the state of Tennessee's highest court on the federal question and the Supreme Court is again precluded from considering the federal

question on that basis. In any event, the equal protection claim of the Petitioners was fully considered and correctly decided before the trial court. The decision of the Respondents was not arbitrary and there was no showing of clear and intentional discrimination on the part of Respondents.

RESPECTFULLY SUBMITTED,

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P.O. Box 444
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(615) 986-8954

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition of Respondents has been properly mailed, postage prepaid, to W.P. Boone Dougherty, Attorney at Law, 307 Medical Arts Building, 603 W. Main Avenue, Knoxville, Tennessee 37902, on this 10 day of May, 1991.

Harvey L. Sproul